No. 20,737

IN THE

United States Court of Appeals

For the Ninth Circuit

D. R. KINCAID, LTD. and THOMAS A. GIULI, doing business as KINCAID-GIULI JOINT VENTURE,

Appellants,

vs.

TRANS-PACIFIC TOWING, INC., BROKERS, INC., and CLARENCE C. T. LOO,

Appellees.

Appeal from the District Court of the United States for the District of Hawaii

Honorable C. Nils Tavares, Judge

BRIEF OF APPELLANTS

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JURISDICTION

This appeal is from a final decree in personam in Admiralty, brought by Appellants against Appellees, alleging a breach of a towing contract by Appellees.

In their Libel, Appellants alleged that the contract which is the subject of this action was one whereby the Appellees agreed to provide their tug and barge

for a round trip voyage from Honolulu, Hawaii, to Midway Island, Kure Atoll, and return to Honolulu. They alleged a breach of this contract of towage.

The United States District Court for the District of Hawaii had jurisdiction over the parties, as Appellants were a joint venture, consisting of a Hawaii corporation and an individual resident of the State of Hawaii, and the principal Appellee was an individual resident of Hawaii. (Record pp. 3-4). The subject of the action to wit, a contract of towage was maritime in nature. (Record pp. 10-19). *Mack Steamship Co. v. Thompson,* Mich. 1910, 176 F. 499, 110 C.C.A. 57, *Knapp v. McCaffrey,* Ill. 1900, 20 S. Ct. 824, 177 U.S. 638, 44 L. Ed. 921, *The Oscada,* D.C.N.Y. 1895, 66 F. 347. The contract being maritime in nature, the District Court had jurisdiction under Section 1333 of the Judicial Code (Title 28, U.S.C.A., Sec. 1333).

This Court has jurisdiction of the appeal from the District Court under Section 1291 of the Judicial Code (Title 28, U.S.C.A., Section 1291).

STATEMENT OF THE CASE

Appellants were a joint venture, consisting of D. R. Kincaid, Ltd., a Hawaii corporation, and Thomas A. Giuli, an individual resident of Hawaii, doing business as "Kincaid-Giuli Joint Venture". They will hereafter be referred to as "Kincaid". The joint venturers were construction contractors and had under construction a loran station and related facilities, being built for the United States Coast Guard on Kure Atoll in the

North Pacific Ocean. Kure Atoll is located about 60 miles from Midway Island and Midway Island in turn is located about 1,200 miles northwest of Honolulu. Other than Midway, there are no other nearby islands which are inhabited by human beings. It is a very remote part of the Pacific Ocean. Kure Atoll, prior to the construction of the loran station, had never been inhabited. It possesses no harbor suitable for ocean-going vessels and is a typical Pacific coral atoll, with a roughly circular barrier reef, over which the surf breaks, and which encloses a shallow lagoon studded with coral heads.

In order to land sufficient construction materials and equipment on Green Island, a low, sandy islet within the lagoon, Kincaid had previously chartered other tugs and barges which had been sent, loaded with cargo, from Honolulu to the vicinity of Kure Atoll, where Kincaid was waiting with a U.S. Navy surplus World War II LCM (Landing Craft, Mechanized). An LCM is a twin diesel-powered shallow draft landing craft, capable of operating in the very shallow water of the lagoon. The LCM had met the seagoing tugs, taken over the tow of the barges, and towed them from the open sea into the shallow lagoon, and beached them on Green Island, where the loran station was located, unloading them at the beach, then returning the barges to the seagoing tug offshore, for the return to Honolulu.

At the time the contract, which is the subject of this action, was signed on March 30, 1961, Kincaid had completed the construction of the loran station, and,

being required to remove its equipment, surplus construction materials, and all extraneous material from the island (including temporary living quarters, mess hall, and electric generating units), required the services of a tug and barge to reverse the landing process. There was no regular means of travel between Kure and Midway, 60 miles away, but in a separate contract, another contractor had previously constructed an airfield on Green Island, and Kincaid, using its own light aircraft, was able to carry personnel and light cargo between Kure and Midway.

Although the contract was executed between Kincaid and Trans-Pacific Towing, Inc., Brokers, Inc., was actually the owner of part of the equipment used, and for practical purposes, the positions of the various Appellees all merge into the person of Appellee Clarence C. T. Loo, who by written agreement assumed the defense of this action and agreed to pay any judgment rendered against any of the Appellees. Thus, we will eliminate mention of the other Appellees and refer to all of them collectively as "Trans-Pacific". In general terms, Trans-Pacific agreed to cause its tug "Port of Bandon", to tow its Barge No. 30 from Honolulu to Midway, then to Kure, where Kincaid's LCM would relieve the tug of the barge, tow the barge to Green Island, load the barge, and deliver the barge back to the tug in deep water outside Kure Lagoon. The tug was then to tow both the barge and the LCM to Midway, where there is a safe, modern harbor. At Midway, the LCM was to be lifted from the water and loaded aboard the barge for the return trip to Honolulu.

Pursuant to the contract, the "Port of Bandon" left Honolulu towing Barge No. 30, and arrived at Midway on or about April 20, 1961. Tug and tow left Midway for Kure the following day, arriving off Kure at about 4:00 o'clock p.m. on the 21st day of April, where Kincaid's LCM relieved the tug of the barge and towed the barge into the lagoon to Green Island. Unlike the situation at the commencement of operations, Green Island now possessed a pier, built by Kincaid, to which the barge was moored, while it was being loaded. The tug, until the barge was loaded and towed to deep water, had nothing to do but wait. The tug, after releasing the barge, proceeded to a large mooring buoy south of Green Island, in about 60 feet of water, and moored to it. This buoy had been installed by the U.S. Coast Guard for two purposes. It was intended for use by visiting ships and it also had connected to it a submerged pipeline to Green Island, for use by oil tankers, when they replenished the Island's fuel supply. The tug remained at this buoy until the next morning, April 22, 1961, when a U.S. Navy tanker arrived and ordered the tug away from the buoy. The tug, then using its own ground tackle, anchored some distance to the northwest of the buoy. She remained there at anchor until about noon on April 24, 1961, when, while weighing anchor, struck her bottom against something, commenced leaking faster than her pumps could pump, and was beached at Green Island by her master to minimize possible loss of life, and became a total loss.

The first real issue between the parties is the question of whether the loss of the tug was due to the

negligence or incompetence of her master, or whether her loss was due to causes beyond the control of the owners or the master.

This turn of events left Kincaid with a loaded barge in Kure Lagoon with no tug to tow it to Midway and Honolulu. Kincaid demanded that Trans-Pacific find another tug to complete the voyage. Trans-Pacific, pointing to the contract, "Exhibit A", denied further responsibility for completing the voyage, and demanded that Kincaid return the barge to Honolulu.

Eventually, Kincaid chartered a Navy tug based at Midway which towed the barge to Midway, where it remained until the parties without prejudice jointly chartered a tug to tow the barge to Honolulu, and the long voyage finally ended.

Kincaid filed its Libel against Trans-Pacific on October 31, 1962, alleging essentially that Trans-Pacific failed to perform its contract of towage through the negligence of the master of the tug, which negligence was the cause of the total loss of the tug. The damages claimed by Kincaid were the cost of safeguarding the barge until it could be towed to Midway, the additional cost of chartering the Navy tug and a commercial tug to complete the voyage, and various other expenditures which Kincaid would not have incurred had the "Port of Bandon" not met with disaster. The Court below held that all of the Appellants' theories depended upon a showing that the tug "Port of Bandon" was lost through the negligence of her master, and the Court, having found that the Appellants had not shown by a preponderance of the

evidence that the negligence of the master was the cause of the tug's loss, the Court made no decision or finding as to the measure of damages to which the Appellants would have been entitled, if successful.

Thus, we see no reason for setting forth the details of the claimed damages in this appeal as they will be a matter for the trial Court to assess on remand should this Court reverse the Court below.

The second issue before this Court is whether, if the tug's loss was caused by the master's negligence, the terms of the contract excuse the Appellees from their failure to perform their towage contract. If this Court should find for the Appellants on this question, then we face the question of the measure of damages to which Appellants are entitled.

Notice of Appeal was filed in the U.S. District Court for the District of Hawaii on November 19, 1965, and the appeal perfected thereafter as the record shows by the certificate of the Clerk of the Court below.

SPECIFICATION OF ERRORS

1. The Trial Court Erred in Its Finding That Appellants did not Prove by a Preponderance of the Evidence that the Loss of the Tug "Port of Bandon" was Proximately Caused by Trans-Pacific's Negligence.

2. The Trial Court Erred in Finding That All of Appellants' Theories were Predicated Upon a Finding That Appellees were Negligent.

SUMMARY OF ARGUMENT

The Court below held that Kincaid failed to prove that Trans-Pacific's negligence was the cause of the loss of its tug. For that reason, the Court entered judgment for Trans-Pacific. If, on the other hand, the Court below *had* found that the loss of the tug was due to the negligence of Trans-Pacific, or if this Court should reverse the finding of the Court below as to the cause of the loss of the tug, then Kincaid is entitled to a decision as to whether it is therefore entitled to its damages from Trans-Pacific as a result of the latter's failure to perform its contract.

Kincaid argues that the evidence was overwhelming that the tug "Port of Bandon" was lost due to the gross and inexcusable negligence of her master, and under such circumstances there was no excuse shown for Trans-Pacific's failure to perform its contract of towage and Kincaid is entitled to damages against Trans-Pacific for its unexcused failure to perform its contract.

Kincaid's claim rests equally well on the theory that the tug of Tran-Pacific was unseaworthy, which was a breach of the contract.

ARGUMENT

1. THE TRIAL COURT ERRED IN ITS FINDING THAT APPELLANTS DID NOT PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE LOSS OF THE TUG "PORT OF BANDON" WAS PROXIMATELY CAUSED BY TRANS-PACIFIC'S NEGLIGENCE.

The issue in this case involves initially the question of the burden of proof of the plaintiff in a civil (or admiralty) action and what constitutes a preponderance of the evidence. This subject is a rudimentary one and, while we hereinafter cite various authorities on the subject, we are well aware that this Court needs no instruction on the meaning of the term "preponderance of the evidence".

Turning to the facts in this case, Appellants find it difficult to believe that any Court could have failed to find that the master of the tug "Port of Bandon" was negligent in the navigation and operation of his vessel, and that such negligence was the cause of the loss of the tug. We submit that it is difficult to find a single act of the tug's master which could clearly be labelled "prudent seamanship", whether related to the sinking or not.

Let us trace his conduct from the beginning of the voyage to its chaotic end. Captain Locy arrived in Honolulu in command of the "Port of Bandon", on his first voyage into tropical Pacific waters. He did not even know the length of his ship, despite having operated her in San Francisco Harbor, shifting larger ships, etc. (Tr. pp. 203-204). He had no experience in tropical coral reef areas. (Tr. p. 218, line 23, et seq.). He could not state whether he had purchased or had

aboard a U.S. Coast and Geodetic Survey Chart of Kure Atoll, although he knew he was going there. (Tr. p. 213-214). He definitely stated (Tr. p. 214) that he first went to Midway Atoll and had no charts of the Island. This is strange conduct indeed for a man venturing into unknown seas and coral reef conditions with which he had no prior experience. If he could not recall purchasing charts of the area, and had none of Midway, it can be inferred that he had no charts of Kure either, except for a vague reference to a chart which he says "Mr. Kincaid gave me". We emphasize this point because later in our argument we will elaborate on what the only charts of Kure in the record have to say about approaching Kure Atoll.

We now shift our attention to the "Port of Bandon" as it approached Kure Atoll on the afternoon of April 21, 1961. Her master had no experience with coral atolls and was not sure whether he even had an adequate chart of the Island. About 1600 (4:00 o'clock p.m.), he released the barge to Kincaid's LCM, and settled down to wait for Kincaid to redeliver the barge, loaded, to the tug. He then proceeded to moor to the U.S. Coast Guard mooring buoy and remained there until the next morning, April 22, 1961. Nothing happened to the tug or any other ship while moored to the buoy. About noon, a U.S. Navy tanker arrived and ordered the tug away from the buoy. (Tr. p. 179-180). At this point, there is some confusion as to where the "Port of Bandon" then anchored, using her own anchor and cable. Captain Locy anchored to the West and inshore from the Coast Guard buoy. He took no bearings to locate his position, and there is

conflicting evidence in the record as to just where he actually anchored the tug. Both may be inaccurate as both are based upon speculation. To this day he does not know where he anchored the "Port of Bandon", and admits it, but let us examine the record to see just what evidence there is of his position at anchor. The only evidence of the position of the tug is gleaned from a Coast Guard hearing about one month after the sinking of the tug. Captain Locy at that hearing, when asked by the examining officer, placed a mark on a chart of Kure Atoll, and the Coast Guard officer then plotted that position. Whether that was the actual anchorage of the tug will never be known, but it was Captain Locy's best belief at the time. (Tr. p. 191). The position he marked was plotted by the Coast Guard Examining Officer as 288° true from the Coast Guard mooring buoy, 1,200 yards from the buoy, and bearing 254° true from the radar reflector on Green Island. These coordinates are plotted (Appellants' Exhibit 2). It will be seen that the tug was far closer to the barrier reef than 450 yards. Yet, Captain Locy at the time of the trial stated that he was 450 yards from the barrier reef. (Tr. p. 160). We submit that the most accurate information available was the Coast Guard finding, based on Captain Locy's statements a month after the accident, as compared to his testimony in Court in March, 1964, nearly three years later. We particularly stress this discrepancy because the Court below in his decision states:

> "The Court believes Captain Locy was an honest witness despite his apparently poor memory and lack of preparation for this trial.

> "It is true that Captain Locy semed to exhibit a strange lack of memory on many details, but this does not prove that he was untruthful. However unusual it might appear that he would not remember details about what he said was the worst catastrophe of his life, it is possible that he was as forgetful as he appeared to be."

After this comment on Captain Locy's memory, the Court below accepts the Captain's three-year old memory that he was anchored 450 yards from the barrier reef on April 22, and discards the Coast Guard findings of fact which were derived from Captain Locy's own testimony a month after the accident. The Court below further discards the testimony of Will B. Smith. Smith was Kincaid's project superintendent and knew the Island. Smith observed the tug leave the Coast Guard mooring buoy, and where it anchored. (Tr. p. 17). He marked this position on Appellants' Exhibit 2. This concerned him as he felt the tug was too close to the barrier reef and on April 23, the day before the sinking, Smith, after a conference with the Coast Guard officer in command of Kure, urged Captain Locy to move from his anchorage and return to the now unoccupied Coast Guard buoy. Smith (Tr. p. 19) states:

> "I said it was my opinion, shared by the Coast Guard Commander of the Island that he pull anchor and go back to the mooring buoy, or down to the slot in the lee of the Island where normally the tugboats anchor."

Smith marked the latter position on Appellants' Exhibit 2. When Locy replied (Tr. p. 21) that the wind

was not too strong and it would be too much trouble, Smith used stronger language and said "I think you're being a damn fool. The wind changes around here, and we have had much trouble in this lagoon." Still, Captain Locy ignored the warnings.

The position and other obstructions in or near the channel or channels to be navigated, and if the peculiarities of the waters in which the towage service is to be performed involve any special hazard, it is the duty of the tug to know these things so far as by due diligence the tug might have ascertained them. In *Thompson v. Winslow* the tug master is bound to know whatever is known to persons in the habit of navigating the waters in question. *Lehigh Valley Transp. Co. v. Knickerbocker,* 212 Fed. 708. In the instant case, Smith informed Captain Locy that in his opinion Captain Locy was in a dangerous anchorage.

The Court below discards the testimony of Vern Christensen, pilot of Kincaid's aircraft, who flew over the tug daily, and who marked its position on Appellants' Exhibit 2, showing the tug as far closer to the barrier reef than 450 yards. (Tr. p. 85). His normal landing approach course took him directly over the area where the tug was anchored, and he had an excellent opportunity to observe her position. In the face of all this evidence, including the prior testimony of Captain Locy in the Coast Guard hearings, all of which indicates that the tug was far closer to the reef than 450 yards, the Court below preferred the later version of Captain Locy, the man with the poor memory, when he says he was 450 yards from the

barrier reef when he anchored the tug. There is not one scintilla of evidence which corroborates his statement.

Turning to Appellants' Exhibit 2, which Captain Locy may never have seen, we find that if he ever saw the chart of Kure Atoll, the following warning is printed prominently thereon:

> "This chart should be used with care as there may be coral heads and no area has been dragged. The reefs are located principally by aerial photography and the depths of water over them are not known."

The tug master is bound to know what appears on government charts of the area. *Lehigh Valley Transp. Co. v. Knickerbocker,* supra. The Coast Pilot and the U.S. Coast and Geodetic Chart warned of the danger of coral heads.

Captain Locy's own testimony is that when he did anchor the tug, he activated his fathometer, to measure the depth of the water. He stated that the depth of water varied as the ship swung at anchor, and if he recalls correctly, the least sounding he got was 50 feet (Tr. p. 160). The bottom did not appear to be flat but had "peak spots-highspots all over". (Tr. p. 182). This statement, of course, indicates the very uneven contour of the sea bottom, and was precisely the danger which Appellants' Exhibit 2 warned of.

The "Coast Pilot", an official U.S. Government Publication, which is a guide to mariners, recommended other anchorages, which Captain Locy disre-

garded, perhaps because he did not even consult the publication or have it aboard. (Tr. p. 104).

At this point, it is submitted that the tug was, from the moment she dropped anchor, in a very perilous and dangerous anchorage, and from the outset, in danger of striking an uncharted coral pinnacle. Her master failed to return to the Coast Guard mooring buoy, failed to heed all warnings, and remained at this anchorage. It is submitted that Appellants had up to this point in the evidence, clearly made a prima facie case of negligence against the master of the tug as no evidence has been offered in rebuttal.

The conduct of Captain Locy, however, was to become even more negligent early on the morning of April 24, 1961, when the wind shifted from north to east. (Tr. p. 185). This caused the ship to swing around so that instead of the bow of the tug being to the barrier reef, the stern was toward the reef. (Tr. p. 64). It is obvious that the tug was now closer to the barrier reef than before, and the wind was now blowing *toward* the reef, rather than away from it.

There was considerable testimony on cross-examination of Captain Locy on the effect of a change of wind direction on the position of an anchored vessel. Although certain other factors, such as current and wave action can affect the action of a ship, an anchored vessel will generally lie to leeward of her anchor. (Tr. p. 200). Thus, we submit, the tug with a length of at least 80 feet anchored in 60 feet of water with 400 feet of anchor cable, would normally actually be to leeward of her anchor at a distance approaching 480

feet, more or less, or about 160 yards to leeward of her anchor. To carry the mathematics of this reasoning further, if the wind shifted so that it was blowing toward the barrier reef rather than away from it, the tug, as it swung around in an 180° arc, could actually take a new position as much as 300 yards *closer* to the barrier reef than before the wind changed, even though the anchor did not change position. We submit that by Captain Locy's own testimony, this is precisely what happened when the wind shifted early on the morning of April 24, 1961. If his position was dangerous enough the day before for Mr. Smith to urge him to leave the anchorage, it was now vastly more so as he was far closer to the barrier reef in an area of uncharted coral pinnacles.

Although the cases cited generally involve damage to the tow, we feel that it is appropriate to cite certain cases involving the lack of diligence of the tug master in failing to take proper action upon a change of the weather. They normally arise where during the voyage the weather changes and the tug fails to take prompt action to remove the tow to a safer place. In the event of the tug's failure upon a change of wind and sea conditions to take proper action, the tug's owners have been held liable for the damage sustained. *Bouchard Transportation Co. v. Pennsylvania R. Co.,* 6 F. 2d 362. In the instant case, Captain Locy knew or should have known that when the winds shifted, his danger greatly increased. See *The Sea King,* 14 F. 2d 684; *Nicholson v. Erie R. Co.,* 255 Fed. 54; *Boutin v. Rudd,* 82 Fed. 685.

Two expert witnesses, Captain Howard Jones and Captain Chester Jackson, both master mariners of great experience, testified that whatever else Captain Locy should have done, he should have left his anchorage immediately when the wind shifted, early on the morning of April 24, 1961 (Tr. p. 114-253), and that it was not an exercise of prudent seamanship to remain at his anchorage after the wind shifted. This testimony is unrebutted by any opinion evidence. Captain Locy remained so anchored until about noon on the 24th, and by noon the wind and sea had increased to the point where the tug was rolling heavily and he felt that the tug might be dragging anchor, and he decided to get underway and head to sea. In the process, of raising the anchor, the tug hit something hard and began to leak. Captain Locy himself, when asked, stated that he believes his tug struck a coral reef (Tr. p. 219). No other explanation has been offered. It is undisputed that the tug began to leak uncontrollably after striking whatever it struck and Captain Locy ran the ship aground to save the crew, and the tug became a total loss.

These are the events upon which Appellants based their argument that the loss of the tug "Port of Bandon" was proximately due to the negligence of its master. No evidence to the contrary was offered by the Appellees and it is submitted that Appellants have shown not only by a preponderance of the evidence, *but beyond any reasonable doubt* that Captain Locy ignored all warnings and negligently moored his ship in an unsafe anchorage, suffered it to remain in such

anchorage until the inevitable happened despite being urged to move and despite a change in wind and sea, and the tug struck a coral pinnacle and was lost. There is no other realistic possibility.

Before turning to a review of the authorities, we feel it might be helpful to examine the decision of the Court below and to point out certain obvious discrepancies between the evidence and the decision. The Court below states that the tug anchored on April 22, 1961, about 1,200 yards west of the buoy and approximately 450 yards south of the barrier reef. The depth of the water there was between 60 and 65 feet. (Dec. p. 2, lines 30 et seq.) The testimony of Captain Locy is that the depth of the water where he lay anchored at that time was between a "high" of 50 feet and 60 feet (Tr. p. 160). The decision further states immediately thereafter:

> "The tug was on the lee side of the island, protected from the wind, until about noon on April 24, 1961, when the wind got stronger and shifted . . ." Dec. p. 3, lines 1, 2 and 3.

The clear testimony of Captain Locy is to the effect that:

> "Around daylight, or after daylight, the wind shifted to an east—coming out of the east, it began picking up, increasing in velocity to somewhere in the neighborhood of thirty miles per hour. As the morning wore on the seas gradually began to come from the same direction. The wind was carrying them in I assume, from the offshore blow. There was more sea and swell than the wind would normally create." (Tr. p. 164).

We particularly emphasize this point, because both of Appellants' experts stated that for Captain Locy to remain in his anchorage *after* the wind shifted would not be prudent. The Court below seems to have forgotten that the wind shifted and increased at daylight, not at noon, and the tug remained in its anchorage for about six hours after the change in conditions. Perhaps, this is why the Court below appeared to attach no significance to the opinions of two master mariners.

The Court was concerned that it would be difficult to locate a ship as small as the tug on the scale of the maps in evidence. (Dec. p. 3, lines 25-29). This may have presented a problem to the trial Court, but it is undisputed that the map to which the Court refers was Appellants' Exhibit 2, which is the official Coast and Geodetic Survey Chart No. 4177, published by the U.S. Government for the guidance of mariners, and certainly the two experts called by Appellants had no problem with the scale of the chart.

The trial Court (Dec. p. 4, lines 21-25) stated that there was no reliable or persuasive evidence that the tug dragged its anchor. With this observation we cannot argue, but point out that when the wind shifted the tug inevitably found itself in shallower water, as the evidence is clear that after the wind shifted the tug was between the anchor and the reef, rather than to seaward from the anchor, and the chart clearly indicates a sloping bottom, becoming shallower as the distance to the reef decreased. The Court then states that there is:

> "... no reliable evidence that it (the tug) actually hit the reef; in fact no clear evidence that it even hit a coral head, *although that seems to be a strong probability.*" Dec. p. 4, lines 23-25. (Emphasis supplied).

We do not wish to unduly labor the point, but submit that the evidence is *overwhelming* that the tug struck the coral, and even the Court felt it to be strongly probable, yet says there is no persuasive evidence as to the fact. Preponderance of evidence means that evidence which is most consistent with the truth as measured by the experience and judgment of the jury; that which accords best with reason and probability. *U. S. v. McCaskill,* 200 F. 332. Preponderance of the evidence is a phrase which in its last analysis means probability of its truth. *Boyd v. Gosser,* 82 So. 758. The preponderance or greater weight of evidence does not merely mean the greater number of witnesses, but means that evidence which, when weighed with that opposed to it, has the most convincing force, and from which it results that the greater probability is in favor of the party presenting it. *Kenney v. Henson,* 107 S.W. 2d 947. We repeat that there is *no* evidence in the record which would otherwise explain what the tug struck, and caused it to sink, other than a coral pinnacle. The Court below (Dec. p. 5, line 20 et seq.) seems to be confused as to what Appellants were attempting to prove, namely that Captain Locy negligently and in the face of many warnings, anchored his vessel too close to shallow water for safety and when the wind shifted, his ship swung around even closer to

the reef and ultimately struck the bottom, sinking as a result. He forgets that a coral reef is made of coral and coral heads and if his ship struck the bottom of the ocean, the water was obviously not deep enough to float it. Lastly, the Court says (Dec. p. 6, lines 1-3) that there is no evidence that anyone knew, or advised the Captain, that there was any special danger from coral heads that could put a hole in the tug in the area where he anchored. The trial Court forgets the U.S. Coast and Geodetic Survey, which published a chart (Appellants' Exhibit 2) for people like Captain Locy, warning him against the very peril which destroyed his ship, and recommending other anchorages, the warning of Will B. Smith, who told him he was in a dangerous anchorage and was a "damn fool" if he did not leave the area, and the U.S. Coast Pilot, which recommended other anchorages.

We find no authorities defining negligence any differently in maritime law than in other situations. It is a word which has been defined by the Court with exceeding frequency and as stated in 65 C.J.S. 304, Section 1a(2), Neligence:

> "Of the numerous definitions of 'negligence', among the best has been declared to be the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."

In *San Francisco Bridge Co. v. The Charles Nelson Co.,* 10 Cal. App. 2d 685, the master of a steamer which was towing a barge noticed that the barge was taking on water. He and his crew were found to be

negligent when the barge sunk as they could have pumped the water from the barge. Where a tug caused its tow to strand through want of accurate knowledge of the channel on the part of the master, the Court found that such want of knowledge amounted to negligence. It further stated that if the locality is more than ordinarily dangerous, she (the tug) is held to a proportionately higher degree of care and skill. *The Somers N. Smith,* 120 Fed. 569. In *The Havana,* 45 Fed. Supp. 244, the master of a vessel was held to be negligent in failing to obtain necessary data to enable him to properly navigate his vessel, which stranded through that negligence.

It is submitted that there can be no other realistic conclusion than that the master of the tug was negligent in the management and operation of his vessel, and that the proximate cause of the loss of the tug was such negligence.

The next logical step we must take is to ask whether the inability of the Appellees to complete the voyage due to loss of the tug excused the Appellees from any duty to perform, if this inability was due to negligence. In most of the cited cases, the tow was damaged due to the negligence of the tug, but in all of the cases we will cite, the principle was applied that loss or damage suffered by the owners of the tow resulting from the negligence of the tug was to be borne by the owners of the tug, despite any contractual provisions to the contrary.

If in fact the "Port of Bandon" was lost through the negligence of her master, then without discussing

the measure of damages we believe it is appropriate to discuss whether or not the loss of the tug under such circumstances excuses Trans-Pacific from performance of the contract. Clearly, a reading of the agreement of the parties shows that it was the intent of the parties that Appellees were obligated to proceed with the "Port of Bandon", towing Barge No. 30 from Honolulu to Kure and return. There is no question that there was no such performance as the tug was a total loss at Kure. Thus, the tug did not perform and we must only look to whether any excuses for non-performance exist. Trans-Pacific relies on the terms of paragraph 13 of the contract. Stripped of language unimportant to this issue we quote as follows:

> ". . . neither Trans-Pacific nor the vessels shall be responsible for loss or damage sustained by Kincaid due to the *failure or refusal* of Trans-Pacific to perform or complete the performance of any transportation service herein provided for, if arising or resulting from loss of . . . the vessels or either of them, or resulting . . . from any *other* cause beyond the control of Trans-Pacific." (Emphasis supplied.)

To us this language means that if the Appellees failed or refused to perform the contract for reasons within their control, then they would be liable for damages due to such non-performance. If Appellees had obtained a more lucrative charter and had deliberately refused to perform or if Captain Locy had deliberately scuttled the ship to collect on the ship's insurance policy, then the failure to perform would have been due to causes within the control of Appellees.

If, on the other hand, an unprecedented storm had caused the loss of the tug and/or barge, or if the tug had been struck by lightning and lost, then *perhaps* under the terms of the contract no further duty to perform would have existed. In this situation we submit that the tug was lost as a direct result of the negligence of her master and that this loss was not due to causes beyond his control. We ask whether the language of the contract meant that it was possible for Trans-Pacific to lose the tug through its own negligence and escape from liability for non-performance, but remain liable for other failures to perform if the causes were within their control. In other words, was the loss of the tug a special type of loss in a special class by itself such that its negligent loss excused Trans-Pacific from a duty to perform?

We say it was not. We say that it was excused from further performance only for reasons which were beyond its control and that the loss of the tug excused Trans-Pacific only if such loss could not have been avoided by proper diligence. Trans-Pacific doggedly takes the position that even its own negligence excused it from any further duty to perform, basing its argument on an unreasonable construction of paragraph 13 of the contract.

Kincaid has a different and second argument saying that even if the Court should construe paragraph 13 of the contract to mean that the negligent loss of the tug or barge would excuse Trans-Pacific from any further obligations under the contract, such a contract is null and void and against public policy. See *San*

Francisco Bridge Co. v. The Charles Nelson Co., 10 Cal. App. 2d 685, wherein defendant by oral agreement agreed that its steamer would tow plaintiff's Barge No. 30 from San Pedro to San Francisco. This agreement was reduced to writing confirming in letter form the oral agreement. The pertinent provision of the contract read as follows:

> "The tow service is to be entirely at the risk of the tow and the steamer 'Griffdu' and her owners take no responsibility whatsoever for the safe towage of said tow, and agree solely and only to furnish the motor power."

The tow commenced and during the voyage, the barge commenced to take on water due to increasingly rough seas and sank lower into the water. This condition became apparent to the master of the steamer, but he took no corrective action, although he could have put men aboard the barge to pump her out. The barge had been equipped with adequate pumps for the voyage. The barge flooded and was lost.

The Court held for the owners of the barge against the owners of the steamer, finding that the barge had been lost as a result of the negligence of the master and crew of the steamer.

When the steamer's owners asserted that by the terms of the towing agreement they were not responsible for loss of the tow, the court stated at page 691:

> ". . . when defendants sought to so limit their responsibility that they would not be liable for their own negligence, they incorporated a provision in the instrument which was opposed to public policy and therefore illegal and void."

See also *The Somers N. Smith,* 120 Fed. 569, where, after it was established that the tug negligently caused its tow to be stranded on a reef, the court held that the burden rests upon a tug to prove an alleged contract that a vessel was to be towed at the risk of her owners, nor will such a contract, if proved, relieve the tug from liability for the consequences of a failure of those in charge to exercise reasonable care and skill in the performance of the service. See also *In re Moran,* 120 Fed. 556; *The Syracuse,* 79 U.S. 167, 171, 20 L. Ed. 382; *Deems v. Canal Line,* 7 Fed. Cas. 348; *Vanderslice v. The Superior,* 26 Fed. Cas. 970; *Williams v. The Vim,* 29 Fed. Cas. 1413; *The Jonty Jenks,* 54 Fed. 1021; *The Adelia,* 1 Hask. 505, Fed. Case No. 79; *The Webb,* 14 Wall. 414, 20 L. Ed. 774; *The Deer,* 4 *Ben.* 352, Fed. 3737; *The Hercules,* 81 Fed. 218; *The M. J. Cummings,* 18 Fed. 178. We could cite innumerable additional cases for the same proposition, namely, that a tug is responsible in damages for its failure to perform a contract of towage, if the failure is the result of the tug's negligence, regardless of the terms of the towage contract. See also *The Margaret,* 94 U.S. 494; *Bisso v. Waterways Transport Co.,* 235 F. 2d 741.

Paragraph 13 is too ambiguous to be construed a clause which would exculpate the Appellees for damages suffered by Appellants.

> "It is the settled rule that exceptions in a charter party inserted, by the shipowner for his benefit, are unquestionably to be construed strongly against him." (*Gillmore & Black,* p. 176.)

Paragraph 13 should not be construed to limit the shipowner's liability because nowhere does it state that the shipowner would *not* be responsible for his "negligence" or the "negligence" or "gross negligence" of the master or crew.

Paragraphs 11 and 12 upon which Trans-Pacific so heavily relies specifically use the word "negligence" and paragraph 13 does not mention "negligence", indicating that the parties did not intend that shipowner be exculpated from liability for the negligence or gross negligence of the master or crew.

The following cases show that paragraph 13, if it is meant to exculpate the Appellees for the gross negligence of the captain and crew, cannot be so used because of its ambiguity.

In the *New Jersey Steam Nav. Co. v. Merchants' Bank,* 12 L. Ed. 465, 482, 47 U.S. 344, 383 (1848), the shipper assumed "all risk" of property transported by him but the exception did not state that the shipper would assume the risks which resulted from the negligence of the captain, crew or carrier, the court stated:

> "The burden of proof lies on the carrier, and nothing short of an expressed stipulation by parol evidence or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful or conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties.
>
> "The special agreement, in this case, under which the goods were shipped, provided that they

should be conveyed at the risk of Harnden; and that the respondents were not to be accountable to him or his employers, in any event, for loss or damage.

"The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, and her management by the master and hands."

In the *Syracuse v. Langley,* 79 U.S. 167, 171 (1870), the captain of steamer towing a canal boat under a private charter was negligent and the owner was liable even though the barge was being towed at her own risk but not mentioning "negligence". The court stated:

"It is unnecessary to consider the evidence relating to the alleged contract of towage because if it is true, as the appellant says, that by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, the disaster occurs, the towing boat must be visited with the consequences."

The case of *Compania de Navigacion La Flecha v. Brauer,* 168 U.S. 104, 118, 18 S. Ct. 12, 15 (1897), the facts involved a contract for the carriage of cattle on the deck of a steamer *at the owners' own risk;* steamer not to be held accountable for accident to or mortality of the animals, from whatever cause arising. A libel against the shipowner was brought for the loss of the cattle, which, during a storm at sea, had been unnecessarily driven overboard by the crew. The court stated:

> "An exception, in a bill of lading, of perils of the sea, or other specified perils, does not . . . exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants contributed."

On page 17, 18 S. Ct. and on page 123, the court stated:

> "The clauses of the bill of lading (other than the reference to British law) or which the respondent relies are those in the first paragraph, 'on deck at owner's risk (shipper); steamer not to be held accountable for accident to or mortality of the animals, from whatever cause arising;' and those in the third paragraph, by which 'it is mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control by the perils of the sea, or other waters' by barratry of the master or crew; or collisions, standing, or other accidents of navigation, of whatever kind, even when occasioned by the negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the shipowner.

> "The bill of lading itself shows that all the cattle to be carried under this contract were to be on deck. The words 'on deck at owner's risk' cannot have been intended by the parties to cover risks from all causes whatsoever, including negligent or willful acts of the master and crew. To give so broad an interpretation to the words of exception inserted by the carrier, and for his benefit, would be contrary to the settled rules of construction, and would render nugatory many of the subsequent stipulations of the bill of lading."

In order to show these three Supreme Court cases are still applicable attention is called to Justice Frankfurter's discussion of the cases in his dissent in *Bisso v. Interland Waterways Corporation* (1955), 349 U.S. 85, 105, 75 S. Ct. 629, 640, a case in which the majority struck down an exculpatory clause in a towage contract (not a private charter):

> "In the leading case of *New Jersey Steam Navigation Co. v. Merchants' Bank* (of Boston), 6 How. 344 (12 L. Ed. 465) . . . (the court stated) 'But we think it would be going further than the intent of the parties . . . were we to regard it as stipulating for . . . want of ordinary care . . . If it is competent at all for the carrier to stipulate . . . it should be required to be done at least in terms that would leave no doubt as to the meaning of the parties', 6 How. 383, 384 (12 L. Ed. 465). See, also . . . *The Steamer Syracuse,* 12 Wall. 167 (20 L. Ed. 382) 168 U.S. (Brauer case), at pages 118-120, 18 S. Ct. at page 15.
>
> "This citation in the *Steamer Syracuse* as an example of instances in which a rule of narrow

construction of exculpatory clauses had been invoked should have set to rest any misunderstanding concerning the scope of its ruling."

Kincaid contends that the only thing clear about the exculpatory clauses in its contract with Trans-Pacific s that it is not clear if there is one exculpatory clause pplicable to this situation—or three of them.

Kincaid further contends that it would be a gross nderstatement to say that the clauses in this contract ith Trans-Pacific are not as clear as those called oid by the Supreme Court of the United States in he above mentioned cases.

THE TRIAL COURT ERRED IN FINDING THAT ALL OF APPELLANTS' THEORIES WERE PREDICATED UPON A FINDING THAT APPELLEES WERE NEGLIGENT.

Impossibility is not an excuse for non-performance. ppellees state they are excused from performance ecause of impossibility of performance since their ig sank.

Appellants say you are not excused because:

"It is clear that for supervening impossibility of performance to operate as a defense available to the contractual promisor, it must be fortuitous on his part. Thus it is stated by Corbin on Contracts, Section 1329 that 'whatever be the meaning given to the term impossibility of, whether it be objective or subjective, and even though it be used to include varying degrees of difficulty and expense, the supervening situation that is so described does not excuse a promisor from his con-

> tractual duty if he himself wilfully brought it about, or if he could have foreseen and avoided it by the exercise of reasonable diligence and efficiency.' " 84 A.L.R. 2d 12, 62.

Also see *Fujikawa v. Sunrise Soda Works Co.* (1946, C.A. 9 Hawaii), 158 F. 2d 490, which follows the above philosophy.

The impossibility of performance argument has been used in the Admiralty Court. *The Richland Queen* (1918, C.A. 2 N.Y.), 254 F. 668, and cited in 84 A.L.R. 2d 108.

Kincaid contends that Trans-Pacific should not be excused for its failure to perform under contract for the reason of "impossibility" because the impossibility was caused by his negligence in sending out an inexperienced captain and crew in strange waters with no charts.

> "There is no evidence in the record that the owners of the tugs, either the record owners or the owners hoc vice, had made any particular inquiries as to his competency. The petitioners seem to think it is sufficient to maintain their case that the owner or owners had no knowledge or reason to believe that the master was not competent; but this form of statement is not sufficient, because it does not comply with the statute which requires 'due diligence'.
>
> "In our prior opinion, in determining that the loss occurred through the fault of the master of the tug, we said as follows:
>
> *"It appears that the captain of the tug neither looked to see whether the tow was straightened*

out on its course, nor received any information from the lookout in that respect, after passing the red buoy.

"This red buoy, we will note was at a critical point in the navigation of the river. An omission so gross as this raises so strong a presumption of fact that the master was not competent as practically to throw the burden to the petitioners to establish the proposition that they used due diligence with reference to his selection, whether the statute does or does not impose such a burden. Yet the other facts which appear in the record, so far as meeting this presumption strengthen it. We are therefore not satisfied that whoever controlled the tug used the due diligence which the statute required in the selection of this master, necessary to justify us in relieving her from liability for this loss which the common law imposed as the result of gross negligence at the critical time." The Cygnet, 126 Fed. 742 (1st Cir. 1903).

"In construing in a bill of lading the exceptions to the shipper's liability, the rule is to be remembered that where the words leave the intention in doubt they are to be construed against the person for whose benefit they have been introduced. Their meaning is not to be extended to give him a protection for which he has not bargained in clear terms.

"Thus, it is presumed, unless stated to the contrary, that the shipowner is to continue liable for negligent acts and defaults, committed by himself, or by his servants or agents engaged in performing the contract. General words, therefore excepting losses from a particular cause, do not protect him if that cause came into operation through

such neglects or defaults." *Carver Carriage by Sea* (English), Fourth Edition, p. 95.

"The courts should be vigilant to see that the extension by analogy of the principle of general average does not encroach upon the equally valid and much more important principle that the shipowner is under a duty to employ whatever means are needful to fulfill *his contract of carriage,* even though difficulties of various sorts may result in its costing him a little more than he hoped." *Gilmore & Black,* p. 238.

Appellees' contention that the Carriage of Goods by Sea Act, 46 U.S.C.A. 1312 and the Harter Act, Vessel Owner's Liability, Limitation, 46 U.S.C.A., Section 190, 191, 192 may be applicable and Appellants welcome the applicability of the above acts.

A. General principles concerning the applicability of the Harter Act, and Cogsa (Carriage of Goods by Sea Act) are:

"It has been felt, apparently that the bargaining power of charterers and owners is equal enough that they may be left to contract freely, a situation in sharp contrast to the great disparity between ship lines and the shippers of package cargo. Nonetheless, it is a settled rule that 'exceptions in a charter party, inserted by the shipowner for his own benefit, are unquestionably to be construed strongly against him.'" *Gillmore & Black,* p. 176.

Neither Cogsa nor the Harter Act apply to cases of private charter but:

"As a matter of practice, many charter party forms stipulate for the applicability of Cogsa or

the Harter Act to the charter—owner relations; such a stipulation is of course valid, *and prevails even where no bill of lading* is issued." *Gillmore & Black,* p. 175.

We agree with Appellees that the Harter Act pplies because paragraph 15 of the contract reads as ollows:

"15. Trans-Pacific shall have all rights to limitation of and exemption from liability as are granted by federal statutes to owners and charters of vessels, and nothing herein contained shall constitute a waiver thereof."

Both the Harter Act and Cogsa deal with limitaons of shipowners from liability. The Harter Act is en in the "Limitation of Liability" chapter of the ode.

Why Cogsa is not applicable and the Harbor Act is:

46 U.S.C.A. 1312, Carriage of Goods by Sea Act eads:

". . . Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions."

"Carriage of Goods by Sea Act expressly relates to 'foreign trade' which is the transportation of goods between ports of the United States and foreign ports." *The Vale Royal,* 51 F. Supp. 412 (Dist. Ct. Maryland 1943).

While it is true the Carriage of Goods by Sea Act ay be adopted in cases of domestic trade by express

agreement, in which case provisions of the Harter Act are superseded. *The Vale Royal,* supra.

The private charter involved here is one between ports of the United States or its possessions. Honolulu, Kure and Midway. Since there are no expressed words indicating Cogsa is to apply the Harter Act if either is applicable.

The Harter Act is now contained in three sections of the U.S.C.A. and reads as follows: Sections 190, 191 and 192, which read as follows:

> "It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading on shipping receipts shall be null and void and of no effect. Feb. 13, 1893, c. 105, Sections 1, 27 Stat. 445."
>
> "It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said

vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. Feb. 13, 1893, c. 105, Sections 2, 27 Stat. 445."

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. Feb. 13, 1893, c. 105, Sections 3, 27 Stat. 445."

Effect of Harter Act on this case if the Court finds it applicable.

1) All limitations of liability in the contract other than those contained in the Harter Act would be void.

The Ninth Circuit (1962) in *Isthmian Steamship Co. v. California Spray-Chem. Corp.,* 300 F. 2d 41, 45,

47, stated this with regard to the Harter Act when other exculpating clauses are in the contract:

> "But the Harter Act must be interpreted in light of the common law as it was, unmodified by the agreements which it permitted. As we have seen, the very purpose of the Harter Act was to prevent the carrier from avoiding its common law responsibilities by the device of recurring 'agreements' which included exculpatory clauses." P. 45.
>
> "The presence of this standardized clause in the contract does not represent an agreement between appellant and the shipper. It is simply a condition unilaterally imposed by the carrier upon the shipper; in the words of some scholars, it is an 'adhesion contract', viz. a contract 'in which one party's participation consists of his mere adherence' (Ehrenzweig, Adhesion Contracts in Conflicts of Laws, 53 Colum. L. Rev. 1072, 1075; see also Dressler, Contracts of Adhesion, 43 Colum. L. Rev. 629). We have already seen that the Harter Act was adopted to prevent the use of just such false agreements which make 'freedom of contract' an illusion." P. 47.

2) In order to escape liability the Appellees would have to show the ship to be seaworthy and properly manned, points in which they have put on little or no evidence to controvert testimony in favor of Appellants which proved:

a. that there were no charts furnished to the captain of the tug by the owners; who was on his first voyage in tropical waters;

b. the owners should have known the captain was incompetent;

c. the owner did not use due diligence in manning or equipping the ship or making it seaworthy.

"Most important, it is to be noted that the warranty of seaworthiness, implied by law in every chapter." *Gillmore & Black,* p. 204.

"In the famous case of the Isis (290 U.S. 333, 54 S. Ct. 162 (1933), the Supreme Court read Section 3 of Harter literally, and held that the condition had to be met before immunity could be availed of, whether or not the actual loss or damage was causally connected in any way with the unseaworthiness defect left uncorrected through a failure of due diligence. Thus, under the Isis rule, a ship, on a voyage subject to the Harter Act, may sail with inadequate or antiquated charts, thereby increasing the risk of her coming to grief in dangerous waters through which she is to pass in the course of the voyage. Before reaching these waters, or even after successfully negotiating them, she may negligently collide with another vessel, damaging herself and her cargo." *Gillmore & Black,* p. 129.

This decision indicates that due diligence must be proved as a condition precedent, under penalty of losing the benefit of the exemption, and failure of proof was fatal.

See *The Cygnet,* 126 Fed. 742, quoted in detail earlier in this memorandum.

Burden of proof to show vessel properly manned is on owner and if one employs a seaman who cannot understand orders, boat not seaworthy or properly manned. *The Nordpol,* 84 F. 2d 3 (2d Cir. 1936).

To secure contribution toward his own expenses an sacrifices in connection with casualty resulting fro negligence of vessel owner's employees under co tractual provisions, vessel owner has burden to estab lish that vessel was in all respects seaworthy, properl manned, equipped and supplied, or that he exercise due diligence to make her so. *The Maria,* (D S.D.N.Y. 1936), 15 F.S. 745.

The burden of proof is upon the carrier or owne to show that the vessel was seaworthy. *Internationa Nav. Co. v. Farr. & Baily Mfg. Co.,* 181 U.S. 218, 2 S. Ct. 591.

A ship not manned by a competent crew is unsea worthy. *Peninsular & Occidental S.S. Co. v. Nationa Labor Relations Board,* C.C.A. 5, 98, F. 2d 411, 414.

Tugboat unseaworthy because of deckhand's lack o qualification and competence. *Moran v. U.S.D.C Mass.,* 82 F. Supp. 525, 526.

Where there is any doubt as to the unseaworthiness of the vessel, that doubt must be resolved against shipowner, in determining liability for cargo damage *The Vizcava* (D.C. Ed. Penn. 1945), 63 F. Supp. 898.

Since the Appellees inserted paragraph 15 into the contract—"it is the settled rule exceptions in a char ter party, inserted by the shipowner for his benefit are unquestionably to be construed strongly against him." *Gillmore & Black,* p. 176.

Although this brief is lengthy and perhaps discretion should dictate against a repetition of assertions made earlier, we would like to remind the Court

hat if Captain Locy was incompetent, then the vessel vas unseaworthy based upon the foregoing authori-ies. His actions or omissions, as the case may be, are nore fully set forth earlier, including but not limited o:

1) His inability to remember whether he had harts of the Kure area;

2) The fact that this was his first voyage into ropical coral filled waters;

3) The obvious warnings printed on his official oast and Geodetic Charts, which if he in fact pos-essed them disregarded;

4) His failure to anchor at the recommended an-horage shown on the chart and his mooring of his essel far inshore from such position;

5) His failure to utilize the Coast Guard mooring uoy after the Navy tanker departed;

6) His failure to heed the warnings transmitted o him by radio from shore that he was too close to he reef;

7) His failure to take cross-bearings to determine hether he was dragging anchor;

8) His failure to get underway early on the morn-ng of the accident when the wind shifted destroying is lee;

9) His failure to remember even the length of his hip despite the fact he had operated her for many ears;

10) The owners' failure to present any evidence whatsoever of exercise of due diligence;

11) His failure to consult the Coast Pilot for the area.

We submit that the master of the "Port of Bandon" was simply out of his element, in unfamiliar conditions and made no effort to obtain such information as was available or to seek or heed the opinions and advice of any person. All of these factors made the vessel unseaworthy and doomed her as surely as if her bottom planking had fallen off due to neglect.

CONCLUSION

Under any of the theories available to the Court the decision and judgment of the Court below should be reversed and the cause remanded with directions to determine the measure of damages to which Appellants are entitled.

Dated, Honolulu, Hawaii,
March 4, 1966.

Respectfully submitted,
HODDICK, ROTHWELL & CHANG,
By ROBERT M. ROTHWELL,
Attorneys for Appellants.

Certificate of Counsel

I certify that, in connection with the preparation f this brief, I have examined Rules 18 and 19 of the nited States Court of Appeals, for the Ninth Cir- uit, and that, in my opinion, the foregoing brief is full compliance with those rules.

Robert M. Rothwell,
Attorney for Appellants.

(Appendix Follows)

Appendix.

Appendix of Exhibits